

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LARRY E. SMITH and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS AFFAIRS MEDICAL CENTER, Dayton, Ohio

*Docket No. 96-948; Submitted on the Record;
Issued January 28, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs has met its burden of proof to terminate appellant's compensation benefits effective October 31, 1994; (2) whether appellant has met his burden of proof to establish continuing disability after October 31, 1994 causally related to his accepted employment injury; and (3) whether the Office properly denied appellant's request for reconsideration under 5 U.S.C. § 8128.

The Board has duly reviewed the case on appeal and finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits effective October 31, 1994.

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.¹ The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to employment.² Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.³ To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.⁴

In the present case, the Office accepted that appellant sustained a right and left shoulder strain, left shoulder tendinitis, lumbar sprain and a mild strain of the cervical spine when he attempted to lift a patient on August 4, 1993. The Office paid appellant compensation for total disability from the date of the injury. The Office provided appellant with notice of the proposed

¹ *Charles E. Minniss*, 40 ECAB 708, 716 (1989).

² *Id.*

³ *Furman G. Peake*, 41 ECAB 361 (1990).

⁴ *Id.*

termination of compensation benefits on September 29, 1994. By decision dated October 31, 1994, the Office terminated appellant's compensation effective that date, and by decisions dated February 28, August 24 and November 1, 1995, the Office denied modification of its October 31, 1994 decision. By decision dated December 21, 1995, the Office denied appellant's request for reconsideration on the grounds that the evidence was insufficient to warrant review of the prior decision.

Following his injury, appellant received treatment from Dr. Dewey O. Mays, Jr., an internist. Dr. Mays submitted periodic form reports in which he opined that appellant continued to be totally disabled. In a report dated August 3, 1994, Dr. Mays related his findings of tenderness of the lumbosacral and cervical spine and diagnosed low back pain, bilateral shoulder pain, cervical pain, stomach pain and pelvic pain.

In a report dated March 4, 1994, Dr. Richard T. Beers, a Board-certified internist and physiatrist and Office referral physician, related the history of injury and findings on examination. Dr. Beers found that appellant had pain in his neck, back and left shoulder, a disc bulge of the cervical spine, possible cervical root compression, a partial rotator cuff tear of the left shoulder, tendinitis of the supraspinatus tendon, and degenerative disc disease of the lumbar spine with a possible herniated disc. Dr. Beers recommended physical therapy and opined that appellant could return to work for four hours per day with restrictions.

In a follow-up report dated May 5, 1994, Dr. Beers noted appellant's continued complaints of tenderness in his neck and left shoulder. Dr. Beers diagnosed cervical and lumbar degenerative disc disease and supraspinatus tendinitis on the left side. Dr. Beers recommended steroid injections and possible surgical intervention.

On May 25, 1994 the Office referred appellant to Dr. Joseph B. Paley, a Board-certified orthopedic surgeon. In a report dated June 23, 1994, Dr. Paley noted appellant's continued complaints of pain in his left shoulder and numbness in his low back with prolonged walking and sitting. Dr. Paley stated that appellant related that his right shoulder had improved. Dr. Paley found, on examination, that appellant's "left shoulder shows tenderness to palpation anteriorly in the bicipital groove." Dr. Paley stated:

"I would feel that [appellant] sustained a temporary aggravation of his chronic low back problem at the time of this incident. He also sustained a mild strain of his cervical spine, and a tendinitis of the left shoulder. He has been treated appropriately. From review of the record, the temporary aggravation probably ceased at the time of Dr. Beers' evaluation in March of 1994."

Dr. Paley opined that appellant's August 4, 1993 employment injury did not cause a bulging disc in his neck or back, and that he did not have "a left rotator cuff tear, but does have tendinitis." Dr. Paley stated that appellant could return to his regular employment.

The Office based its termination of appellant's compensation on the report of Dr. Paley. The Board has carefully reviewed the opinion of Dr. Paley and notes that it does not have sufficient reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case, *i.e.*, whether appellant had any continuing

residuals of his employment injuries, right and left shoulder strain, left shoulder tendinitis, lumbar sprain and a mild strain of the cervical spine, after October 31, 1994. Dr. Paley did not discuss whether appellant had any continuing impairment due to his continuing left shoulder tendinitis or strain of the cervical spine. He stated that appellant's low back problem "probably" ceased by March 1994 but did not provide any notable explanation for this opinion. Thus, Dr. Paley's report is not sufficient to meet the Office's burden of establishing that appellant had no continuing disability or residual condition after October 31, 1994.⁵

The decisions of the Office of Workers' Compensation Programs dated December 21, November 1, August 24 and February 28, 1995 are hereby reversed.

Dated, Washington, D.C.
January 28, 1998

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member

⁵ Given the Board's disposition of the Office's termination of appellant's benefits, it is not necessary to consider the issue of whether appellant met his burden to establish continuing disability or whether the Office, in its December 21, 1995 decision, properly denied appellant's request for merit review.